

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3477-20
A-0198-21
A-0581-21
A-0697-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

RICHARD GOMES,

Defendant-Respondent.

APPROVED FOR PUBLICATION

June 9, 2022

APPELLATE DIVISION

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MOATAZ M. SHEIRA,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JASON CHIRIBOGA,

Defendant-Respondent.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

MAJU D. BARRY,

Defendant-Respondent.

Argued (A-3477-20, A-0198-21, and A-0697-21) and
Submitted (A-0581-21) May 26, 2022 —
Decided June 9, 2022

Before Judges Haas, Mawla, and Mitterhoff.

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. S-2020-1306-1225; Morris County, Docket No. S-2021-0016-1421; Middlesex County, Indictment Nos. 21-08-0745 and 21-06-0575.

Patrick F. Galdieri, II, Assistant Prosecutor, argued the cause for appellants in A-3477-20, A-0581-21, and A-0697-21 (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Patrick F. Galdieri, II, of counsel and on the briefs).

Alison Perrone, First Assistant Deputy Public Defender, argued the cause for appellant in A-0198-21 (Joseph E. Krakora, Public Defender, attorney; Alison Perrone, of counsel and on the brief).

Scott A. Gorman argued the cause for respondent in A-3477-20 (Maitlin Maitlin Goodgold Brass &

Bennett, attorneys; Scott A. Gorman, of counsel and on the brief).

Matthew W. Kelly, Assistant Prosecutor, argued the cause for respondent in A-0198-21 (Robert J. Carroll, Morris County Prosecutor, attorney; Matthew W. Kelly, on the brief).

Thomas J. Chaves, attorney for respondent in A-0581-21.

Hassen Ibn Abdellah, attorney for respondent in A-0697-21 (Noelle van Baaren, of counsel and on the brief).

Alexander Shalom argued the cause for amicus curiae American Civil Liberties Union of New Jersey in A-3477-20 and A-0198-21 (Tess Borden and Jeanne LoCicero, on the briefs).

Michael B. Roberts argued the cause in for amicus curiae New Jersey State Bar Association in A-3477-20 (Domenick Carmagnola, President, of counsel; Michael B. Roberts, on the brief).

Claudia Joy Demitro, Assistant Attorney General, argued the cause for amicus curiae Attorney General in A-0198-21 (Matthew J. Platkin, Acting Attorney General, attorney; Jeremy Feigenbaum, State Solicitor, Alec Schierenbeck, Deputy State Solicitor, and Claudia Joy Demitro, Assistant Attorney General, of counsel and on the brief).

The opinion of the court was delivered by

MAWLA, J.A.D.

These back-to-back matters require us to resolve whether, pursuant to the enactment of the New Jersey Cannabis Regulatory, Enforcement

Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:6I-31 to -56, N.J.S.A. 54:47F-1, N.J.S.A. 40:48I-1, N.J.S.A. 18A:61F-1, N.J.S.A. 2C:35-23.1, and N.J.S.A. 2C:52-6.1,¹ a defendant may be admitted into pretrial intervention (PTI) where they have a prior conditional discharge for marijuana charges. In A-0198-21, defendant Moataz Sheira appeals from an August 6, 2021 order from the Morris-Sussex Vicinage denying him admission to PTI, and in A-3477-20, A-0581-21, and A-0697-21 the State appeals from June 14, September 15, and September 29, 2021 orders entered in the Middlesex Vicinage granting defendants Richard Gomes, Jason Chiriboga, and Maju D. Barry admission to PTI over the State's objection. We affirm in the Morris-Sussex matter and reverse in the Middlesex cases.

By way of background, each defendant has a disorderly persons offense for a prior charge for possession of marijuana, N.J.S.A. 2C:35-10(a)(4), which was dismissed via conditional discharge under N.J.S.A. 2C:36A-1. In each case, dismissal occurred following successful completion of a diversionary treatment program. We next lay out the offenses each defendant was charged with leading to their applications for admission to PTI.

In November 2020, Gomes was charged with third and fourth-degree assault by auto, N.J.S.A. 2C:12-1(c)(2). In March 2021, Sheira was arrested

¹ L. 2021, c. 16.

and charged with two counts of third-degree possession of cocaine and heroin, N.J.S.A. 2C:35-10(a)(1). In August 2021, Chiriboga was indicted with: two counts of third-degree conspiracy to commit burglary, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:18-2; two counts of third-degree attempted burglary, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:18-2; three counts of third-degree conspiracy to commit credit card fraud, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:21-6(h); three counts of third-degree theft by deception, N.J.S.A. 2C:20-4; and fourth-degree receiving stolen property, N.J.S.A. 2C:20-7(a). In June 2021, Barry was indicted on third-degree attempted theft, N.J.S.A. 2C:20-3(a), and second-degree robbery, N.J.S.A. 2C:15-1.

Expungements, PTI, Conditional Discharges, and CREAMMA

In 1979, the Legislature enacted Chapter 52 concerning the expungement of records it "deemed essential for enactment" of the New Jersey Code of Criminal Justice, L. 1979, c. 178. State v. T.P.M., 189 N.J. Super. 360, 364 (App. Div. 1983). Until 2019, Chapter 52 defined "expungement" to mean "the extraction and isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system." L. 1979, c. 178, § 107, modified by L. 2019, c. 269, § 1 (effective June 15, 2020). Chapter 52 directs that

expunged records be "placed in the control of a person . . . designated by the head of" the criminal justice or law enforcement agency in possession of the records at the time of the petition, N.J.S.A. 2C:52-15(a), including for use "by the court in determining whether to grant or deny the person's application for acceptance into a supervisory treatment or diversion program for subsequent charges." N.J.S.A. 2C:52-20. Agencies in possession of such records are directed to use them "for the purpose of determining whether or not to accept a person into supervisory treatment or diversion program for subsequent charges." Ibid.

Despite the myriad of potential uses of expunged records, the effect of an expungement is that "[u]nless otherwise provided by law . . . the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly, except" in three instances. N.J.S.A. 2C:52-27. One exception mandates disclosure of "[t]he fact of an expungement of prior charges . . . dismissed because of the person's acceptance into and successful completion of a supervisory treatment or other diversion program . . . to any court determining the propriety of accepting said person into a supervisory treatment or other diversion program for subsequent criminal charges[.]" N.J.S.A. 2C:52-27(b). The prior statute, N.J.S.A. 2C:51-4(a), provided that

following expungement of an arrest record, "the person . . . shall be forthwith relieved from any disabilities as may have otherwise existed by reason thereof," L. 1978, c. 95, but subsequent amendments removed this language with the enactment of N.J.S.A. 2C:52-27. L. 1979, c. 178.

Since enactment, N.J.S.A. 2C:52-6 allowed expungement of records of arrests or charges not resulting in conviction and did so in identical language for the first thirty-four years the statute was in effect. In 2015, the Legislature changed the procedure for expunging conditional discharge records and other arrests or charges not resulting in convictions. L. 2015, c. 261, § 4. Under the 2015 amendments, rather than requiring a defendant to file a duly verified petition for expungement, the court is directed to automatically "at the time of dismissal, acquittal, or discharge . . . order the expungement of all records and information relating to the arrest." N.J.S.A. 2C:52-6(a).²

The statute permits a defendant "at any time following the disposition of proceedings, [to] present a duly verified petition . . . to the Superior Court . . . praying that records of such arrest and all records and information pertaining thereto be expunged." N.J.S.A. 2C:52-6(b). Further, an expungement of a dismissal, acquittal, or discharge does not bar any future expungement.

² As enacted, the statute read "relating to the arrest or charge," L. 2015, c. 261, § 4, but "or charge" was later deleted in 2019. L. 2019, c. 269, § 4.

N.J.S.A. 2C:52-6(a)(5).

The 2019 amendments to Chapter 52 included expanding access to expungements for persons with prior convictions by creating an automated "clean slate" expungement mechanism and modifying the definition of expungement in N.J.S.A. 2C:52-1 to mean "the extraction, sealing, impounding, or isolation of all records on file[.]" N.J.S.A. 2C:52-1(a). N.J.S.A. 2C:52-6(a) was amended and expanded to make expungement automatic for dismissed charges, independent of any action or not by affected defendants upon an acquittal, dismissal, or discharge. L. 2019, c. 269, § 4.

"PTI is a 'diversionary program through which certain offenders are able to avoid criminal prosecution by receiving early rehabilitative services expected to deter future criminal behavior.'" State v. Roseman, 221 N.J. 611, 621 (2015) (quoting State v. Nwobu, 139 N.J. 236, 240 (1995)). "[A]cceptance into PTI is dependent upon an initial recommendation by the Criminal Division Manager and consent of the prosecutor." Ibid.

The purpose of the PTI statute was to "allow[] for legislative input into the operation of such programs." S. Judiciary Comm. Statement to S. 738 13 (May 15, 1978). Since its inception in 1979, the PTI statute has provided that "[s]upervisory treatment . . . shall be available to a defendant irrespective of whether the defendant contests his guilt[.]" but it "may occur only once with

respect to any defendant[.]" N.J.S.A. 2C:43-12(g). See also State v. McKeon, 385 N.J. Super. 559, 569 (App. Div. 2006) (holding "[t]he statutory bar is applicable to defendants who have already received, at the expense of this State, the benefit of a state-approved diversionary program[, including conditional discharge] tailored to the defendant's individual needs[.]"); State v. O'Brien, 418 N.J. Super. 428, 438, 441 (App. Div. 2011) (barring a defendant who received a conditional discharge for a marijuana-related offense from PTI "whether the conditional discharge [wa]s later vacated or not[.]" because it was "consistent with the legislative intent to bar re-diversion[.]"); State v. A.S.-M., 444 N.J. Super. 334, 343 (App. Div. 2016) (holding "[t]he statute and rule preclude supervisory treatment if a participant in the PTI program has been conditionally discharged on separate and unrelated charges. A defendant is clearly ineligible for PTI on new, unrelated charges.").

In 2013, the Legislature amended the PTI statute to state the types of supervisory treatment barring PTI entry, including conditional discharges. N.J.S.A. 2C:43-12(g)(1). The purpose of adding this language was to expand the ineligibility provision, N.J.S.A. 2C:43-12(g), "by providing that a person who has participated in either conditional dismissal or conditional discharge w[ould] not be eligible for PTI." S. Judiciary Comm. Statement to A. 3598 at 4 (June 6, 2013). The Office of Legislative Services acknowledged the

amendments could "result in a decrease in the number of defendants applying for PTI as a result of various disqualifiers enumerated in the bill." Fiscal Note to A. 3598 4 (June 13, 2013).

The conditional discharge statute authorizes courts to place defendants in supervisory treatment, either with or without a guilty plea, where a defendant has been charged with a disorderly persons or petty disorderly persons offense under the Comprehensive Drug Reform Act of 1987 (CDRA), N.J.S.A. 2C:35-1 to -36A-1, and has not previously been convicted under that chapter. N.J.S.A. 2C:36A-1. The statute provides the dismissal of charges upon "[t]ermination of supervisory treatment . . . without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities, if any, imposed by law upon conviction of a crime or disorderly persons offense[.]" N.J.S.A. 2C:36A-1(b). Like the PTI statute, the conditional discharge statute requires that placement "may occur only once" and a defendant shall not be placed in a conditional discharge program unless a court concludes "[t]he person has not previously received supervisory treatment" under either the PTI statute, the conditional discharge statute, or N.J.S.A. 24:21-27, the predecessor of N.J.S.A. 2C:36A-1. N.J.S.A. 2C:36A-1(b), (c).

In 2021, the Legislature enacted CREAMMA, which "primarily

concern[ed] the development, regulation, and enforcement of activities associated with the personal use of products that contain useable cannabis . . . by persons [twenty-one] years of age or older." A. Approp. Comm. Statement to A. 21 1 (Dec. 15, 2020). The Legislature also amended various sections of the Code to effectuate "certain criminal and civil justice reforms, particularly addressing the legal consequences associated with certain marijuana . . . offenses as well as raising awareness of available expungement relief." L. 2021, c. 19.

The Legislature amended N.J.S.A. 2C:35-10 to provide that any person who "after the effective date" of CREAMMA, is in "possession of six ounces or less of marijuana . . . is not subject to any punishment, as this possession is not a crime, offense, act of delinquency, or civil violation of law[.]" N.J.S.A. 2C:35-10(a)(4)(b). However, any person who "[p]rior to the effective date" of the statute was in "possession of [fifty] grams or less of marijuana . . . is a disorderly person[.]" N.J.S.A. 2C:35-10(a)(4)(a).

Pursuant to CREAMMA, "any . . . placement in a diversionary program . . . entered prior to" the first day of the fifth month following the statute's effective date, where "the judgment of conviction or final disposition on the matter was not entered prior to that date," and the diversionary placement "solely involved one or more . . . offenses" decriminalized under the act "shall

be vacated by operation of law." N.J.S.A. 2C:35-23.1(b). With respect to expungements, "any case that, prior to the effective date, includes . . . any disorderly persons offense or petty disorderly persons offense subject to conditional discharge pursuant to N.J.S.[A.] 2C:36A-1, shall be expunged by operation of law, and any remaining sentence, ongoing supervision, or . . . financial assessment . . . shall be vacated by operation of law." N.J.S.A. 2C:52-6.1. The Assembly Appropriations Committee explained the law "decriminalize[s marijuana] offenses, requiring . . . vacating . . . placement in diversionary programs . . . as well as expunging past charges, arrests, and convictions for such offenses and providing for administrative action to expunge records associated with any such matters . . ." A. Approp. Comm. Statement to A. 21 (1R) 29 (Dec. 15, 2020).

The Trial Court Rulings

With this as the background, we now turn to the trial court rulings on appeal. In the Middlesex cases the judge found the Legislature's intent in enacting CREAMMA was "not merely [to] legalize the possession of marijuana prospectively but also . . . to undo the harmful consequences suffered as a result of the former statute that criminalized the possession and use of marijuana." He cited N.J.S.A. 2C:52-6.1, which automatically expunges "by operation of law" prior convictions and "any disorderly persons offense or

petty disorderly persons offense subject to conditional discharge pursuant to [N.J.S.A. 2C:36A-1.]"

The judge concluded it follows from N.J.S.A. 2C:52-6.1, "that any other collateral consequence for the expunged offense should also be prohibited[,] including the statutory bar to PTI eligibility for one who [had been] previously was enrolled in a diversion program pursuant to the conditional discharge [s]tatute." To conclude otherwise "would contravene the clear Legislative intent of the [s]tatute." He distinguished O'Brien because, here, N.J.S.A. 2C:52-6.1 did "not necessarily vacate the conditional discharge," but rather "expunge[d] the underlying offense that resulted in the conditional discharge."

The judge referenced the CREAMMA legislative findings, listing the debilitating socio-economic effects a marijuana arrest can have on a defendant and that CREAMMA intended to discontinue the "ineffective and wasteful past marijuana enforcement policies." N.J.S.A. 24:6I-32(n-o). He noted CREAMMA's enactment was necessary "to promote social justice and to provide a clean slate for those who have been harmed . . . by the former prohibition [on] the use of marijuana." The statute "clearly demonstrates an intent to restore those who have previously suffered any adverse consequence to the position they enjoyed before commission of an offense now deemed lawful." Because the cannabis reform laws make it "abundantly clear there

should be no adverse consequence to anyone for a previous case that includes a disorderly persons offense subject to conditional discharge," the judge concluded it was improper to deny Gomes and Chiriboga PTI.

The judge noted Barry's case was "an anomaly" because he had been charged with a second-degree crime, requiring the prosecutor's consent for PTI admission. See R. 3:28-1. However, because the prosecutor did not condition the objection to PTI on an unwillingness to consent but rather on statutory ineligibility, the judge reasoned he could override the rejection.

The judge in the Morris-Sussex case reached a different conclusion, noting, as a general matter, expunged records still "can be used for other purposes" and that when the Legislature enacted N.J.S.A. 2C:52-6.1, it could have stated "these records can never be used for any purpose whatsoever, notwithstanding any other statute[,]" but did not do so. Therefore, he found no clear legislative intent to end the PTI bar for expunged records of a conditional discharge following successful supervisory treatment.

The judge concluded he was bound by O'Brien and that it was "the fact" of the prior individualized supervisory treatment that prohibits "re-enrollment in another diversionary program under PTI." He reasoned he could not "read . . . into the statute" that the Legislature intended individuals whose marijuana offense records were expunged under N.J.S.A. 2C:52-6.1, would be exempt

from the PTI bar otherwise applicable to those who previously had marijuana charges conditionally discharged. The Legislature chose the word "expungement," meaning courts are still "allowed to use those records, despite their expungement," including determining eligibility for PTI. Because Sheira benefited from a prior diversion, the PTI statute barred entry into another program.

In A-0198-21, we granted Sheira's motion for leave to appeal, which raised the following points:

I. THIS COURT SHOULD GRANT DEFENDANT'S MOTION FOR LEAVE TO APPEAL AND REVERSE THE TRIAL COURT'S ORDER DENYING THE STATE'S JOINT MOTION TO ADMIT DEFENDANT TO PTI BECAUSE THE TRIAL COURT ERRONEOUSLY CONCLUDED, CONTRARY TO THE INTENT OF NEW JERSEY'S MARIJUANA REFORM LEGISLATION, THAT A DEFENDANT WHO RECEIVED A PRIOR CONDITIONAL DISCHARGE FOR A LOW-LEVEL MARIJUANA OFFENSE IS INELIGIBLE FOR PTI.

II. THE INTEREST OF JUSTICE REQUIRE IMMEDIATE APPELLATE REVIEW.

In A-3477-20, A-0581-21, and A-0697-21 the Middlesex County Prosecutor raises the following point on appeal:

I DEFENDANT WAS BARRED FROM ADMISSION INTO PTI BECAUSE HE PREVIOUSLY RECEIVED A CONDITIONAL DISCHARGE FOR A MARIJUANA-POSSESSION CHARGE, AND THE TRIAL COURT THUS

REVERSIBLY ERRED IN GRANTING HIS
MOTION FOR PERMISSION TO APPLY TO PTI.

We granted the American Civil Liberties Union of New Jersey's motion to appear as amicus. It argues:

I. BARRING A PERSON FROM PTI BECAUSE THEY PREVIOUSLY RECEIVED SUPERVISORY TREATMENT FOR MARIJUANA UNDERMINES THE LEGISLATIVE INTENT AND PURPOSE OF BOTH THE MARIJUANA REFORM AND PTI STATUTES.

A. With Marijuana Reform, The Legislature Clearly Intended To Remove Legal Disabilities Arising From Low-Level Marijuana Charges, Specifically In The Criminal Legal System; Its Silence As To PTI Eligibility Must Be Interpreted In Line With This Intent.

i. Marijuana expungement is more expansive than previously enacted expungement provisions.

ii. The Legislature specifically stated that marijuana records cannot be used for other legal system exclusions.

B. The PTI Statute's Purpose Is Rehabilitation And "Correction" Of Past Criminal Behavior; That Purpose Is Not Served By Barring Someone Whose Past Behavior The Legislature Has Deemed Non-Criminal.

C. O'Brien Is Cabined By "Patent And Gross Abuse Of Discretion" Review And Does Not Decide This Case.

II. READING THE TWO STATUTES TO CREATE A PER SE BAR TO PTI FOR A PERSON WHO PREVIOUSLY RECEIVED SUPERVISORY TREATMENT FOR MARIJUANA WOULD YIELD AN ABSURD RESULT AND CONSTITUTE DISPARATE TREATMENT.

When we granted Sheira's motion for leave to appeal, we invited the Attorney General to participate in the appeal. The Attorney General argues:

I. A MARIJUANA OFFENSE THAT THE LEGISLATURE HAS EXPUNGED AND VACATED DOES NOT CATEGORICALLY BAR A DEFENDANT FROM ENROLLMENT IN PTI.

We granted the New Jersey State Bar Association's motion to appear as amicus. It argues:

I. WHEN INTERPRETED TOGETHER, THE SWEEPING REFORMS OF [CREAMMA], COMBINED WITH THE REFORMATIVE PRINCIPLES OF THE [PTI] PROGRAM . . . , NECESSARILY REMOVE ANY BAR TO THE APPLICATION TO PTI FOR A DEFENDANT WHO HAS PREVIOUSLY BEEN ADMITTED TO A SUPERVISORY TREATMENT PROGRAM FOR A QUALIFYING MARIJUANA OFFENSE.

I.

These appeals concern statutory interpretation, a question of law, which we review de novo. State v. S.B., 230 N.J. 62, 67 (2017). "The overriding goal" of statutory interpretation "is to determine . . . the intent of the Legislature, and to give effect to that intent." State v. Hudson, 209 N.J. 513,

529 (2012). "The inquiry thus begins with the language of the statute, and the words chosen by the Legislature should be accorded their ordinary and accustomed meaning." Ibid. "Where the plain language of a statute is clear, we enforce the statute as written." Correa v. Grossi, 458 N.J. Super. 571, 579 (App. Div. 2019) (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)).

Courts should "apply to the statutory terms the generally accepted meaning of the words used by the Legislature," Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 418 (2009), "read . . . in context with related provisions so as to give sense to the legislation as a whole[.]" DiProspero, 183 N.J. at 492. "If the language leads to a clearly understood result, the judicial inquiry ends without any need to resort to extrinsic sources." Hudson, 209 N.J. at 529. "[E]xtrinsic aids may not be used to create ambiguity when the plain language of the statute itself answers the interpretative question; however, when the statutory language results in more than one reasonable interpretation, then resort may be had to other construction tools . . . in the analysis." Id. at 529-30. Resort to extrinsic evidence may "includ[e] legislative history, committee reports, and contemporaneous construction." DiProspero, 183 N.J. at 492-93 (quoting Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004)).

II.

The PTI statute states "any person who has previously received . . . a

conditional discharge pursuant to N.J.S.A. 2C:36A-1 . . . shall not be eligible for supervisory treatment" in the PTI program. N.J.S.A. 2C:43-12(g). "When according to statutes their plain meaning . . . 'the word "shall" generally is mandatory.'" In re State Bd. of Educ.'s Denial of Petition to Adopt Reguls. Implementing N.J. High Sch. Voter Registration L., 422 N.J. Super. 521, 532 (App. Div. 2011) (quoting Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 325 (2000)). Similarly, Rule 3:28-1(c)(1) deems ineligible for PTI a "person who has . . . previously been placed into supervisory treatment in New Jersey under the conditional discharge statute pursuant to . . . N.J.S.A. 2C:36A-1."

The expungement of a conditional discharge does not obviate the clearly worded PTI statute because the statute cross-references the expungement statute. Indeed, the PTI statute states: "No order of expungement or sealing shall affect any entry in the index" of cases maintained by the Administrative Office of the Courts (AOC) containing "applications for supervisory treatment[,]" and the "dispositions of those applications[.]" N.J.S.A. 2C:43-21(a), (d).

The expungement statute also cross-references the PTI statute, and permits expunged records to "be used by the court in determining whether to grant or deny the person's application for acceptance into a supervisory treatment or diversion program for subsequent charges[,]" and to allow

agencies in possession of such records to use them "for the purpose of determining whether or not to accept a person into supervisory treatment or diversion program for subsequent charges." N.J.S.A. 2C:52-20. Following expungement, defendants may answer any questions concerning previously expunged arrests as if they had not occurred, except when applying to PTI or any other diversion program, in which case defendants must disclose "[t]he fact of an expungement of prior charges . . . dismissed because of the person's acceptance into and successful completion of a supervisory treatment or other diversion program." N.J.S.A. 2C:52-27(b).

In G.D. v. Kenny, 205 N.J. 275, 295 (2011), the Supreme Court held that expunged records can be used for, among other things, "matters relating to decisions about diversion into a supervisory program[.]" In O'Brien, we held "where an individual is placed into supervisory treatment under the conditional discharge statute, N.J.S.A. 2C:36A-1, that person is prohibited from later entering into PTI[.]" 418 N.J. Super. at 438.

CREAMMA did not amend, reference, or supersede the conditional discharge, PTI, or expungement statutes. Rather, the Legislature carefully worded CREAMMA to: 1) vacate by operation of law any pending placement in a diversionary program solely for marijuana offenses entered within five months of the statute's effective, only where "final disposition on the matter

was not entered prior to that date[.]" N.J.S.A. 2C:35-23.1(b); 2) expunge pending marijuana disorderly persons or petty disorderly persons offenses subject to conditional discharge; and 3) vacate "ongoing supervision[.]" N.J.S.A. 2C:52-6.1.

We reject the arguments questioning the reasoning in G.D. and O'Brien since the advent of CREAMMA because the "'Legislature is presumed to be aware of the judicial construction placed on an enactment.' When, after a long period, the Legislature does not act to amend a statute to contradict our interpretation, then we may presume its acquiescence to the construction given to the provision." State v. Smith, 197 N.J. 325, 335 (2009) (quoting State v. Chapland, 187 N.J. 275, 291 (2006)). "The Legislature knows how to draft a statute to achieve [a] result when it wishes to do so." State v. W. World, Inc., 440 N.J. Super. 175, 198 (App. Div. 2015) (quoting Zabilowicz v. Kelsey, 200 N.J. 507, 517 (2009)).

The 2013 amendments to N.J.S.A. 2C:43-12(g) explained "that a person who has participated in . . . conditional discharge will [also] not be eligible for PTI." S. Judiciary Comm. Statement to A. 3598 at 4 (June 6, 2013). That clearly expressed legislative intent cannot be ignored.

When the Legislature enacted N.J.S.A. 2C:52-6.1, ordering the expungement of "any case that . . . include[d] . . . any disorderly persons

offense or petty disorderly persons offense . . . subject to conditional discharge" for marijuana offenses, it created a different procedure for underage persons found in possession of cannabis, including the issuance of warnings and write ups for infractions. N.J.S.A. 2C:33-15(a)(1). Notably, warnings and write ups for underage persons "shall be destroyed or permanently deleted[.]" and "shall not be . . . considered . . . with respect to any . . . eligibility or decision for diversion or discharge[.]" N.J.S.A. 2C:33-15(a)(6)(b). Unlike expunged records, the effect of directing the destruction of records for underage persons is that the records will not be placed in the AOC's supervisory treatment index, N.J.S.A. 2C:43-21(d), for potential use in evaluating future PTI applications, N.J.S.A. 2C:52-20.

When a law "has two distinct sections dealing with related matters, amendment to one section is not an amendment to others because it is presumed that if the [L]egislature had intended an amendment to apply to both sections it would have expressed such an intent." 1A Norman J. Singer, Sutherland Statutory Constr. § 22.34 (7th ed. 2007). "The Legislature is presumed to be familiar with its own enactments, and to have passed or preserved cognate laws with the intent that they be construed to serve a useful and consistent purpose." Zoning Bd. of Adjustment of Sparta Twp. v. Serv. Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 380-81 (App. Div.

1985). Pursuant to these principles, the Legislature's differential treatment of records of prior and pending charges for petty and disorderly persons marijuana offenses in N.J.S.A. 2C:52-6.1, compared to its treatment of records associated with underage persons' use of marijuana in N.J.S.A. 2C:33-15 evinces its intent to subject the former group to the limitations associated with expungements.

Extrinsic evidence supports our reading of the statutes in question. Proposed Assembly bill, A. 1978 (2022) would amend N.J.S.A. 2C:36A-1(e) to provide that "[a] person who has previously participated in . . . supervisory treatment . . . shall be eligible for supervisory treatment under this section if the previous supervisory treatment concerned . . . offenses involving . . . marijuana . . . subject to conditional discharge pursuant to this section." The bill would further amend the PTI statute to state: "A person who previously received . . . a conditional discharge . . . shall be eligible for supervisory treatment . . . if the previous supervisory treatment concerned . . . marijuana." Ibid. The bill synopsis explains "that [a] defendant who participated in [a] diversion program for certain marijuana offenses on prior occasion may again participate under certain circumstances." Ibid.

The Sponsor's Statement to the proposed bill states:

Under current law, these programs require that the person wishing to participate not have been a

previous participant in that particular program or in another diversionary program. Under the bill, previous participation in a diversionary program would no longer bar participation on a second occasion if the first participation was for a marijuana . . . offense that was subsequently decriminalized.

[Sponsor's Statement to A. 1978 15-16 (Jan. 11, 2022).]

For these reasons, the holdings in the Middlesex cases cannot stand because they are contrary to the language in the controlling statutes. "[A] statute cannot be interpreted to abrogate existing law by implication alone[.]" because "[t]he [L]egislature is presumed to intend a consistent body of law." 1A Singer, Sutherland Statutory Constr. at § 23.9. "There is a strong presumption against repealing statutory provisions by implication[.]" Voss v. Tranquilino, 206 N.J. 93, 95 (2011), and "[e]very reasonable construction should be applied to avoid a finding of implied repealer." Twp. of Mahwah v. Bergen Cty. Bd. of Tax'n, 98 N.J. 268, 281 (1985). Accord N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 555 (2012). Because "implied repealers are disfavored" they are to "be avoided if the two enactments" at issue "can be read harmoniously and sensibly." Brown v. Jersey City, 289 N.J. Super. 374, 379 (App. Div. 1996). "When two statutes may stand together, each governing its own sphere of operation, there is no inconsistency from which an intent to repeal may be inferred." Jackson Twp. Bd. of Educ. v. Jackson Educ. Ass'n ex

rel. Scelba, 334 N.J. Super. 162, 171 (App. Div. 2000).

N.J.S.A. 2C:52-6.1 is neither inconsistent with, nor repugnant to, the Legislature's earlier enacted rule permitting only one prior diversionary placement, including conditional discharges under N.J.S.A. 2C:36A-1(c)(3). N.J.S.A. 2C:52-6.1 did not alter the definition of an expunged record or the legal consequences flowing from an expungement. Further, our overall review of CREAMMA does not support the Middlesex cases' conclusion that the Legislature sought to extinguish "any other collateral consequence[s]" arising from a prior diversionary program because the statute orders the expungement of "any case that . . . includes . . . any disorderly persons offense or petty disorderly persons offense subject to discharge[,] as well as "any remaining sentence, ongoing supervision, or unpaid court-ordered financial assessment" N.J.S.A. 2C:52-6.1. The statute is forward looking and does not contradict N.J.S.A. 2C:43-12(g), limiting PTI to one opportunity. Indeed, the goals of PTI are "to deter future criminal conduct and to provide a one-time diversion from prosecution[.]" O'Brien, 418 N.J. Super. at 441. Moreover, possessing cannabis in quantities of less than fifty grams was not only a disorderly persons offense at the time of defendants' prior diversionary placements, prior possession remains a disorderly persons offense. N.J.S.A. 2C:35-10(a)(4)(a). Therefore, each defendant benefitted by receiving a

conditional discharge.

If the Legislature intended to repeal or amend, N.J.S.A. 2C:43-12(g)(1), N.J.S.A. 2C:43-21(d), N.J.S.A. 2C:52-20, N.J.S.A. 2C:52-27(b), or overrule Rules 3:28-1(c)(1) and -5(a), it would have done so. Our review of the relevant statutes and legislative history shows no "clear and compelling evidence" of that intent. Mahwah, 98 N.J. at 280. There is no support for the Middlesex Vicinage judge's finding the Legislature intended "to restore those who ha[ve] previously suffered any adverse consequence to the position they enjoyed before commission of an offense now deemed lawful."

In the Middlesex cases, the judge concluded O'Brien was not persuasive because the defendant would not receive an expungement by vacating a prior conditional discharge, as doing so would simply return the previously vacated charges to the trial calendar. In contrast, the judge found N.J.S.A. 2C:52-6.1 did not "necessarily" vacate defendants' prior conditional discharges, but rather "expunge[d] the underlying offense that resulted in the conditional discharge." We conclude this effort to distinguish O'Brien misread the case because the issue of whether the conditional discharge itself was later vacated was irrelevant; the dispositive issue was whether "the individual previously received supervisory treatment which prohibit[ed] [them] from re-enrollment into another diversionary program under PTI." O'Brien, 418 N.J. Super. at

438.

The interpretation of the statutory framework in the Middlesex cases is also irreconcilable with CREAMMA and its legislative history. The Assembly Appropriations Committee's Statement to CREAMMA explains that "[u]sing . . . marijuana . . . would no longer be illegal . . . and thus there would be no legal consequences flowing" from that use, but "[a]s to individuals facing existing consequences associated with their past . . . offenses involving marijuana . . . the bill provides multiple opportunities for criminal justice relief." A. Approp. Comm. Statement to A. 21 25. The Statement then limited discussion of the relief in the same manner as the statutory text, namely; expeditious dismissal of pending charges, vacating of penal and remunerative consequences for such charges, and expungement. Notably, the language describing "opportunities for criminal justice relief" from existing consequences for past offenses is narrower than the language purporting that "no legal consequences" will flow from future marijuana use made lawful under the amended statutes. Generally, a word is given more precise content by the neighboring words with which it is associated. Herzog v. Twp. of Fairfield, 349 N.J. Super. 602, 607 (App. Div. 2002). Had the Committee intended to convey that all legal consequences from all prior offenses would be extinguished, it would have similarly stated "no legal consequences" will flow

from prior charges, instead of listing the limited opportunities for potential relief from those consequences.

"The Legislature is presumed to be familiar with its existing enactments and is presumed to intend that its newer enactments be harmonized with the existing ones, in light of the Legislature's purpose." Correa, 458 N.J. Super. at 580. We cannot inject language into a carefully worded statute. The introduction of legislation to remedy this issue confirms our reading of the law, and the remedy is appropriately left to the Legislature to enact with retroactive effect or not.

Affirmed in A-0198-21. Reversed in A-3477-20, A-0581-21, and A-0697-21. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION